Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000290-001 DT 06/04/2012

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
K. Waldner
Deputy

STATE OF ARIZONA

ANDREW M DAVIDSON

v.

MARK ADANADUS (001)

C DANIEL CARRION

REMAND DESK-LCA-CCC
TEMPE MUNICIPAL COURT

RECORD APPEAL RULING / REMAND

**Lower Court Case Number 10–046238–3.**

The Tempe Municipal Court suppressed the evidence obtain by the officer, ruling A.R.S. § 28–751(1) does not apply to a vehicle making a right turn from the driveway exit of a parking lot onto a city street. The State has asked this Court to reverse the trial court's ruling, contending A.R.S. § 28–751(1) does apply to this type of turn. Based on the facts as found by the trial court, this Court vacates and reverses the trial court's ruling.

I. FACTUAL BACKGROUND.

On August 22, 2010, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2); and improper right turn, A.R.S. § 28–751(1). Prior to trial, Defendant filed a Motion To Dismiss alleging the officer did not have reasonable suspicion to stop his vehicle.

Based on the testimony presented at the hearing on Defendant's Motion To Dismiss, the trial court found Defendant made a wide right turn from the driveway exit of a parking lot of a business located at the southwest corner of Priest Drive and Elliot Road, and turn onto Elliot Road. When Defendant made the right turn, instead of turning into the number 3 (curb) lane, he turned so his vehicle straddled the line between the number 3 (curb) lane and the number 2 (middle) lane, and straddled that line for 20 to 30 yards before he moved into the curb lane. Based on his subsequent investigation, Officer Hampton cited Defendant for violations of A.R.S. § 28–1381(A)(1) & (A)(2) and A.R.S. § 28–751(1).

In its Minute Entry dated January 25, 2011, the trial court noted Officer Hampton gave as a reason for stopping Defendant's vehicle, his belief that Defendant violated A.R.S. § 28–751(1), which provides as follows:

> The driver of a vehicle intending to turn shall do so as follows:
>
> 1. Right turns. Both the approach for a right turn and a right turn shall be made as close as practicable to the right hand curb or edge of the roadway.

The trial court then noted A.R.S. § 28–621 provides as follows:

> The provisions of this chapter [3] and chapter 5 of [Title 28] relating to the operation of vehicles refer exclusively to the operation of vehicles on highways except:
>
> 1. If a different place is specifically provided by statute.
>
> 2. Article 4 of this chapter [accidents] and section 28–693 [reckless driving] apply on highways and elsewhere throughout this state.

The trial court further noted "roadway" is defined by A.R.S. § 28–601 as follows:

> "Roadway" means that portion of a highway that is improved, designed or ordinarily used for vehicular travel, exclusive of the berm or shoulder. If a highway includes two or more separate roadways, roadway refers to any such roadway separately but not to all such roadways collectively.

The trial court reasoned the driveway of a parking lot is not a "roadway" under this definition, thus A.R.S. § 28–751(1) does not apply to a vehicle turning out of the driveway of a parking lot. It therefore concluded Defendant's driving did not violate A.R.S. § 28–751(1), thus that statute did not provide a legal basis for the stop.

The trial court then considered the second reason Officer Hampton gave for stopping Defendant, and that was Defendant's vehicle straddled the lane line for 20 to 30 yards. The trial court referred to A.R.S. § 28–721.1, which apparently was a typographical error because there is no A.R.S. § 28–721.1, and A.R.S. § 28–721(A) provides a person shall drive on the right half of the roadway. It appears the trial court was referring to A.R.S. § 28–729.1, which requires a person to "drive a vehicle as nearly as practicable entirely within a single lane." The trial court noted no testimony was elicited describing to what degree Defendant "straddled" the lane line, and stated "the State must produce some evidence that establishes reasonable and articulable facts to suspect a person is engaging in unlawful activity." The trial court then stated no such evidence was offered. The trial court ruled as follows: "The Defendant's Motion To Dismiss is denied, however, a Motion To Suppress the evidence after the stop is granted."

The State filed a Motion for Reconsideration, noting the Arizona Court of Appeals had held in *State v. Bouck*, 225 Ariz. 527, 241 P.3d 524 (Ct. App. 2010), that A.R.S. § 28–751(1) did apply to a vehicle turning out of a private driveway onto the roadway. In its Minute Entry dated March 4, 2011, the trial court stated, "At a first review of the *Bouck* case, one would assume then that the case before the Tempe Court was erroneously decided." It then noted its determination of the applicability of A.R.S. § 28–751(1) began with an analysis of A.R.S. § 28–621, which the court of appeals did not do in *Bouck*. The trial court then ruled as follows:

> There is no mention or discussion of A.R.S. § 28–621 in the *Bouck* decision. Therefore, it is difficult for this Court to reconcile the rationale in that case with the case before the Tempe Municipal Court. A.R.S. § 28–621 gives notice to the public that the statutes within Chapter 3 (of which A.R.S. § 28–751.1 is included) apply to operation of vehicles exclusively only on the highway. This Court has not been provided with any statutory or other legal authority by the State which holds that the requirements of this statute can be interpreted to pertain to one part of a statute and not to another. Moreover, there are two other statutes in Title 28, Chapter 3 (A.R.S. § 28–774 and A.R.S. § 28–856) which specify the correct way to exit a private road, driveway, ally and commercial building, which would seem to indicate that the highway requirement in A.R.S. § 28–621 does apply to A.R.S. § 28–751.1 in its entirety since no exception language is stated in that statute. For these reasons, and those stated in this Court's original opinion, the original order of the Court stands.

The State then moved to dismiss the charges against Defendant without prejudice and filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: DID THE TRIAL COURT CORRECTLY DETERMINE, AS A MATTER OF LAW, THAT A.R.S. § 28–751(1) DID NOT APPLY TO A VEHICLE TURNING OUT OF A PRIVATE DRIVEWAY.

The State contends the trial court erred when it determine, as a matter of law, that A.R.S. § 28–751(1) did not apply to a vehicle turning out of a private driveway of a parking lot onto the roadway. In reviewing a trial court's ruling on a motion to dismiss or suppress, an appellate court is to defer to the trial court's factual determinations, including findings based on a witness's credibility and the reasonableness of inferences the witness drew, but is to review de novo the trial court's legal conclusions. *State v. Moody,* 208 Ariz. 424, 94 P.3d 1119, ¶¶ 75, 81 (2004); *State v. Gonzalez-Gutierrez,* 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); *State v. Olm,* 223 Ariz. 429, 224 P.3d 245, ¶ 7 (Ct. App. 2010). A police officer has reasonable suspicion to detain a person if there are articulable facts for the officer to suspect the person is involved in criminal activity or the commission of a traffic offense. *State v. Lawson,* 144 Ariz. 547, 551, 698 P.2d 1266, 1270 (1985). The Arizona statutes provide that a peace officer may stop and detain a person as is reasonably necessary to investigate an actual or suspected violation of any traffic law committed in the officer's presence. A.R.S. § 28–1594; A.R.S. § 13–3883(B). Thus, the actual or suspected violation of a traffic statute provides sufficient grounds to stop a vehicle. *State v. Orendain,* 185 Ariz. 348, 352, 916 P.2d 1064, 1068 (Ct. App. 1996); *State v. Acosta,* 166 Ariz. 254, 257, 801 P.2d 489, 492 (Ct. App. 1990), *quoting United States v. Garcia,* 897 F.2d 1413, 1419 (7th Cir. 1990). The question then is whether the trial court made the correct ruling as a matter of law.

In *State v. Bouck,* 225 Ariz. 527, 241 P.3d 524 (Ct. App. 2010), the court held A.R.S. § 28–751(1) applied to turns made from a private driveway onto a roadway:

> . . . A.R.S. § 28–751(1) prescribes both the manner of "the approach" to a turn and the manner of the turn itself. That is, the statute requires that "[b]oth the approach for a right turn and a right turn" must be "made as close a practicable" to the right-hand side of the curb or roadway. Although we need not decide the issue, it may be true, as Bouck argues, that the statute's direction to "approach" a turn "as close a practicable to the right-hand curb or roadway" does not apply to a driver turning right from a driveway onto a roadway. But we see no reason to conclude that a driver turning from a private driveway onto a roadway is exempt from the statute's requirement that the "right turn" itself must be "made as close as practicable to the right hand curb or edge of the roadway." Accordingly, when a driver turns from a driveway onto a roadway, the statute requires him to proceed onto the roadway "as close as practicable to the right hand curb or edge of the roadway."

*Bouck* at ¶ 8. The court further held as follows:

> Because we drive on the right-hand side of the street, a rule that a right turn must be made "as close as practicable to the right-hand curb" *necessarily requires a turn into the lane closest to the curb at the end of the turn.*

*Bouck* at ¶ 15 (emphasis added).

In the present case, the lane "closest to the curb at the end of the turn" was the number 3 (curb) lane. Because "at the end of the turn" Defendant was straddling the line between the number 3 (curb) lane and the number 2 (middle) lane, he did not turn into the lane closest to the curb at the end of the turn, and therefore violated A.R.S. § 28–751(1). Thus, as a matter of law, Officer Hampton had the legal authority to stop Defendant's vehicle, and thus as a matter of law, the trial court erred in granting Defendant's motion, which it deemed was a motion to suppress.

In the present case, the trial court chose not to follow *Bouck* because it concluded the court of appeals had not addressed the effect of A.R.S. § 28–621. It was beyond the authority of the trial court not to follow *Bouck*. "Whether prior decisions of [a higher] court in the state are to be disaffirmed is a question for the court which makes the decision." *McKay v. Industrial Comm'n*, 103 Ariz. 191, 193, 438 P.2d 757, 759 (1968); *accord, State v. McPherson*, 228 Ariz. 557, 269 P.3d 1181, ¶ 13 (Ct. App. 2012) ("[The Arizona Court of Appeals] is bound by decisions of the Arizona Supreme Court and has no authority to overturn or refuse to follow its decisions."), *quoting State v. Long*, 207 Ariz. 140, 83 P.3d 618, ¶ 23 (Ct. App. 2004). Thus, the trial court should have followed *Bouck* and left to the court of appeals the question whether A.R.S. § 28–621 negated the opinion it had issued.

It appears, however, the court of appeals did take into consideration the effect of A.R.S. § 28–621. In the present case, the trial court based its reasoning on the language of § 28–621 stating the "provisions of this chapter . . . relating to the operation of vehicles refer exclusively to the operation of vehicles on highways." It reasoned that, because Defendant made the first part

of his turn (the approach) in an area not on a roadway (highway) and only made the second part of his turn (the finish) in an area that was a roadway (highway), A.R.S. § 28–751(1) did not apply to any part of his turn. The court of appeals, however, said the following:

> Although we need not decide the issue, it may be true, as Bouck argues, that the statute's direction to "approach" a turn "as close a practicable to the right-hand curb or roadway" does not apply to a driver turning right from a driveway onto a roadway. But we see no reason to conclude that a driver turning from a private driveway onto a roadway is exempt from the statute's requirement that the "right turn" itself must be "made as close as practicable to the right hand curb or edge of the roadway."

*Bouck* at ¶ 8. It thus appears the court of appeals was saying, because the first part of the turn (the approach) was in an area not on a roadway (highway), under A.R.S. § 28–621 the requirements of A.R.S. § 28–751(1) did not apply to the approach, but because the second part of the turn (the finish) was in an area that was a roadway (highway), the requirements of A.R.S. § 28–751(1) did apply to the finish. In the present case, because the second part of Defendant's turn (the finish) was in an area that was a roadway (highway), the requirements of A.R.S. § 28–751(1) did apply to the finish of Defendant's turn.

The trial court also based its reasoning on its conclusion that A.R.S. § 28–774 and A.R.S. § 28–856 apply in this situation. Those statutes provide as follows:

> The driver of a vehicle about to enter or cross a highway from a private road or driveway shall yield the right-of-way to all closely approaching vehicles on the highway.

A.R.S. § 28–774.

> The driver of a vehicle emerging from an ally, driveway or building within a business or residential district shall:
>
> 1. Stop the vehicle immediately before driving onto a sidewalk or onto the sidewalk area extending across any alleyway or private driveway.
>
> 2. Yield right-of-way to any pedestrian as necessary to avoid a collision.
>
> 3. On entering the roadway, yield the right-of-way to all closely approaching vehicles on the roadway.

A.R.S. § 28–856. The trial court reasoned these two statutes would control Defendant's driving in the present situation, thus A.R.S. § 28–751(1) would not apply. The court in *Bouck* addressed this concern and held that both A.R.S. § 28–856 and A.R.S. § 28–751(1) would apply to a vehicle leaving a private driveway and going onto a roadway. *Bouck* at ¶¶ 9–10. The court in *Bouck* did not address A.R.S. § 28–774, but it appears to this Court the reasoning the court used in *Bouck* would apply equally to A.R.S. § 28–774, Thus, all three statutes would apply to Defendant's conduct.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court erred as a matter of law when it ruled Officer Hampton did not have the legal authority to stop Defendant's vehicle. Thus as a matter of law, the trial court erred in granting Defendant's motion, which it deemed was a motion to suppress.

**IT IS THEREFORE ORDERED** vacating and reversing the ruling of the Tempe Municipal Court.

**IT IS FURTHER ORDERED** the Tempe Municipal Court shall enter its order denying Defendant's Motion To Dismiss/Suppress.

**IT IS FURTHER ORDERED** remanding this matter to the Tempe Municipal Court for all further appropriate proceedings.

**IT IS FURTHER ORDERED** signing this minute entry as a formal Order of the Court.

*/s/ Crane McClennen*
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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